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Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, ET AL.,

Petitioners,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 103 F. (2d) 765. The opinion of the District Court is not officially reported. It appears at page 5 of the record.

JURISDICTION

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

STATUTE INVOLVED

Judicial Code, § 51 (28 U. S. C. A. 112) so far as material provides as follows:

> "• • • no civil suit shall be brought in any district court against any person by any original process or

proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

STATEMENT OF THE CASE

Petitioners, citizens of the State of New Jersey and residents of the District of New Jersey (R. 9), commenced this suit in the District Court of the United States for the Southern District of New York against United Shipyards, Inc. and John E. Aldred, citizens of the State of New York and residents of the Southern District of New York (R. 9-11), the Chase National Bank, a national banking association having its principal office within the State of New York and the Southern District of New York (R. 10), and Joseph W. Powell, a citizen of the State of Massachusetts and a resident of the District of Massachusetts (R. 10), who has appeared generally herein. Petitioners applied for an injunction to restrain United Shipyards, Inc., of which they are stockholders, from transferring substantially all its properties to respondent (R. 1-2). A preliminary injunction was denied, and the transfer was consummated (R. 2). A supplemental bill (R. 9-46) was then filed by leave of the District Court (R. 6-8), adding respondent as a defendant and praying that respondent be declared trustee for petitioners of an interest in the property conveyed (R. 44), much of which is within the jurisdictional limits of the Southern District of New York (R. 16, 32, 35, 36, 43; Judicial Code, § 97, 28 U. S. C. A. 178; see *Gefle Manufacktur Aktiebolag* v. *U. S.* (S. D. N. Y., 1923) 291 Fed. 927).

The declaration of a trust is sought by petitioners on the basis of acts by respondent in the Southern District of New York (R. 32-43, 55).

Respondent has its chief business office at No. 25 Broadway, New York City, within the Southern District of New York. In addition, that office in a factual sense is the corporate domicile of respondent, since at that place and at no other place its Board of Directors meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept (R. 55).

Respondent is a corporation organized under the laws of Delaware (R. 64), but except technically, it is not present in Delaware. Its office in Delaware is a nominal one, consisting of a listing with the Corporation Trust Company, and it has no plants or other property of a substantial and permanent nature in Delaware (R. 55).

Respondent's certificate of incorporation expressly authorizes it to conduct its business and exercise its powers (R. 68) and to hold its stockholders' meetings and keep its books (R. 72) outside of Delaware, as is permitted by the statutes of that state.[1]

Respondent has been qualified to do business in New York since 1918 (R. 56), its designated office in the State of New York being its headquarters at No. 25 Broadway, New York City, in the Southern District of New York (R. 81).

Respondent's qualification and designation were effected under statutes which provided, and now provide[2] that suits

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[1] § 32, Del. Corp. Law, printed in appendix; *Lippman* v. *Kehoe Stenograph Co.* (1915) 11 Del. Ch. 80, 91-92; id. 190, 202; affirmed (1918) id. 412, 424; 95 Atl. 895, 900; 98 Atl. 943, 948; 102 Atl. 988.

[2] N. Y. Code of Civil Procedure, § 1780, last part; slightly amplified in a particular not relevant here and reenacted as § 47, Gen. Corp. Law by L. 1920, c. 916; § 1; renumbered Gen. Corp. Law § 225, by L. 1929, c. 650, § 1. § 225 is printed in the appendix.

may be maintained in the New York Courts by non-residents or by corporations organized under the laws of another state against foreign corporations where, as here,

(a) the cause of action arose in New York or where, as here also,

(b) the defendant is doing business in New York.

The equity subpoena (R. 42) was served on respondent within the Southern District of New York by delivering it personally to the designated agent (R. 77-79) at the designated office at No. 25 Broadway, New York City (R. 48).

QUESTIONS PRESENTED

1. Does a corporation organized under the laws of one state, by qualifying to do business in another state and designating an agent for the service of process pursuant to its statutes, consent to be sued in the local courts on causes of action over which such courts have jurisdiction under such statutes, and thereby waive the privilege conferred by § 51 of the Judicial Code against being sued in a district other than that of plaintiff's or defendant's residence, as to such causes of action, where maintainable in the local federal courts because of diversity of citizenship and the required amount in controversy?

2. Is a corporation incorporated under the laws of one state, in which it has no activities or property of a substantial nature, a resident, within the meaning of § 51 of the Judicial Code, of a district in another state, within the jurisdictional limits of which district its main business headquarters, its registered office, its designated agent and a substantial part of its properties are located?

SUMMARY OF ARGUMENT

I

Respondent has waived the venue defense in this case, since

The venue provision is a restriction limiting the power of each of the district courts to compel defendants to appear before it, and nothing else.

Respondent filed the designation here in question in compliance with a requirement by New York that it agree to appear before the courts on notice to the designee.

That designation was a consent to be sued in any court in the state, and is equally effective in the local federal courts having jurisdiction as federal courts.

II

Respondent is an inhabitant of the Southern District of New York for venue purposes, even though treated as a citizen of Delaware for purpose of jurisdiction, since

"Citizen" in the jurisdiction clause and "inhabitant" in the venue clause of the Judicial Code are not synonymous. Congress deliberately used different words to convey different meanings.

A corporation incorporated on paper in one state, where it does no business, is an inhabitant of another state, where it has its business headquarters, where its directors meet, its chief executives have their offices, and where it is permitted to do business by the laws of both states.

This proposition has never been directly passed on by this Court. All that this Court has actually held is that for venue purposes a corporation incorporated in one state, where it transacts business, does not become an inhabitant of another state by doing some business there.

The rule contended for by petitioners will require a corporation to answer suit in the federal courts in the district where it can most conveniently defend or where, if doing business, it can be most conveniently sued by the plaintiff. The venue statute will thus be made effective as to corporations in the manner explicitly provided by Congress with respect to natural persons, and a corporation will not be permitted, as has respondent here, to avoid suit in the district where it does most of its business, and to compel those whose property has been affected by the doing of that business to seek it in a distant district chosen by it for paper incorporation.

ARGUMENT

I

Bethlehem having established in the Southern District of New York its main business headquarters, and under the New York General Corporation Law having applied for and received authority to do business in New York, and as a condition of such permission having designated an agent for service of process, has waived the right to assert, under § 51 of the Judicial Code, that it is not an inhabitant of that district and therefore cannot be sued there by petitioners.

A. The venue provision is a restriction limiting the Court's power to compel defendants to appear before it, and nothing else.

Unlike the common law venue restriction requiring an action for the primary purpose of affecting title to real estate to be brought in the district where the land is located,[3] or the common law venue restriction which required personal actions to be brought where the cause of action arose,[4] or venue restrictions in a state like New York having a court of general jurisdiction with branches sitting for trial in many different localities of the state, requiring certain kinds of actions to be tried in certain of the localities,[5] the general venue restriction applicable to the circuit courts was a restriction having to do only with the power of the courts to

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[3] *Massie* v. *Watts* (U. S. 1810) 6 Cranch 148, 158.
[4] Chitty's Pleading, 1809 ed. vol. 1, p. 282.
[5] N. Y. Civil Practice Act, §§ 182-189.

require defendants to appear before them. The original Judiciary Act divided the country into districts, most often coextensive with the various separate, sovereign states, and established a circuit court for each such district.[6] After establishing the districts and the courts, Congress next conferred on the circuit courts generally, jurisdiction over the subject-matter of various classes of suits. Next, in contradistinction to this broad grant, the local jurisdiction of the several courts over the persons of defendants was limited to those within their respective districts,[7] as was the jurisdiction of the state courts limited to persons within state boundaries. The language[8] is as follows:

> "the circuit courts shall have original cognizance, concurrent with the courts of several States, of *all*[9] suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * the suit is between a citizen of the State where the suit is brought, and a citizen of another State. * * * *But* no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against

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[6] § 2, 1 Stat. 73.

[7] See opinion of Mr. Justice Story on circuit in Massachusetts in *Picquet* v. *Swan* (1828) 5 Mason 35, 40-47, where the interpretation to be given the venue provision was considered at length. The rationale of Mr. Justice Story was expressly approved and adopted by the Court in *Toland* v. *Sprague* (1838) 12 Pet. 300, 330-331. These cases are discussed in notes 39-41 *infra*, pp. 35-38.

[8] § 11, 1 Stat. 78.

[9] All emphasis in quotations added unless otherwise noted.

> an inhabitant of the United States, by an original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, * * *."

Thus the provision was a limitation of the jurisdiction over defendants to inhabitants of the district, who might owe obedience to local laws, and to persons found within the district for service of process. As such, it was recognized as conferring merely a personal privilege on the defendant with respect to the effectiveness of the means of bringing him before the court, which he might waive if he chose.

> *Pollard* v. *Dwight* (1808) 4 Cranch 421, 428-429;
> *Gracie* v. *Palmer* (1823) 8 Wheat. 699;
> *Toland* v. *Sprague* (1838) 12 Pet. 300, 330-331.

The amendment of 1887 [10] limited the jurisdiction over non-resident defendants found within the district to diversity-of-citizenship cases commenced by residents, but left unchanged the jurisdiction over inhabitant defendants, and with a brief interruption [11] this Court has accordingly continued to regard venue as a mere restriction on the scope within which process would be effective to bring defendants before the court. In *Interior Construction & Imp. Co.* v. *Gibney* (1895) 160 U. S. 217, 219 this Court said:

> "the provision as to the particular district in which the action shall be brought does not touch the general

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[10] March 3, 1887, c. 373, § 1, 24 Stat. 552, corrected Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. The applicable portion is quoted *supra*, pp. 1-2.

[11] See *Ex parte Wisner* (1906) 203 U. S. 449; disapproved in *Ex parte Moore* (1908) 209 U. S. 490, 507 and expressly overruled in *Lee* v. *Chesapeake & Ohio Ry. Co.* (1923) 260 U. S. 653, 660.

> jurisdiction of the court over such a cause between such parties, but affects only *the proceedings taken to bring the defendant within such jurisdiction*, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; • • •"

Speaking of the venue defense in *Macon Grocery Co.* v. *Atlantic Coast Line* (1910) 215 U. S. 501, 508 this Court said:

> "as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of *the persons* of the defendants."

This Court said in *Camp* v. *Gress* (1919) 250 U. S. 308, 311:

> "The objection of John M. Camp is not to the jurisdiction of a Federal court, but to the jurisdiction *over him* of the court of the particular district; that is, the objection is to the venue. He asserts the personal privilege not to be sued in a district other that that of his residence, since the action is not brought in the district of the plaintiff's residence."

In *General Investment Co.* v. *Lake Shore & M. S. R. Co.* (1922) 260 U. S. 261, 273 again referring to an objection to venue, this Court said:

> "And the inability of the court to proceed with the cause in the presence of such an objection would not have resulted from any want of power to entertain and determine such a suit between such parties, if they were before it, but only because the company *declined to yield the necessary jurisdiction of its person.*"

B. Respondent's designation was filed in compliance with a requirement by New York that a foreign corporation desiring authority to do business in the state agree to appear before the courts on notice to the designee.

The statute under which the designation was filed was Chapter 687 of the Laws of 1892, the pertinent parts of which are as follows (pp. 1805-1806):[12]

> "§ 15. Certificate of Authority of a Foreign Corporation.—No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or, if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. * * * No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate."

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[12] These sections were repealed by L. 1923, c. 787, § 2 (p. 1421), § 1 of which re-enacted them (pp. 1412-1414) in substantially similar form as §§ 110, 111, Stock Corp. Law. By L. 1927, c. 425, § 2, §§ 110, 111, Stock Corp. Law were repealed and by § 1 the provisions were amplified to their present form and re-enacted as §§ 15, 16a, 16b, 16f, 16g and 16h Gen. Corp. Law, and by L. 1929, c. 650, renumbered as presently designated, Gen. Corp. Law §§ 210, 212, 213, 217, 218 and 219, respectively. §§ 210, 213 and 218 are printed in the appendix.

"§ 16. Proof to be filed before granting certificate.—Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it purposes to carry on, within the state, and a place within the state which is to be its principal place of business, and designating, in the manner prescribed in the Code of Civil Procedure, a person upon whom process against the corporation may be served within the state."

* * * * * * * * * *

"If the person so designated dies, or removes from the place where the corporation has its principal place of business within the state, and the corporation does not within thirty days after such death or removal, designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability incurred within this state before such revocation may, after such death or removal and before another designation is made, be served upon the secretary of state. * * * the secretary of state shall forthwith mail a copy of such notice to such corporation, if its address or the address of any officer thereof is known to him."

These sections were adopted in order to remedy an actual or feared defect in the jurisdiction of the courts over foreign corporations doing business in the state, and to require corporations desiring authority to do such business to directly submit themselves to such jurisdiction. In the absence of statute, the New York courts, while finding no difficulty in adjudicating against foreign corporations which

came before them voluntarily[13] disclaimed all power to compel foreign corporations to appear before them.[14] Provisions for attaching the property of foreign corporations,[15] and later for making personal service of a summons and complaint on their officers[16] were adopted, resulting generally in continued refusal by the courts to admit they had any power to compel foreign corporations to submit to jurisdiction *in personam*.[17] Statutes requiring foreign corporations doing business in the state to designate process agents were adopted, first obligatory only on foreign insurance companies[18] and later on all foreign corporations.[19] On two earlier occasions, the Court of Appeals, relying on the geographical theory of corporations as expounded by

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[13] *McCormick* v. *Penn. Cent. Rd. Co.* (1872) 49 N. Y. 303.

[14] *M'Queen* v. *Middletown M. Co.* (1819) 16 Johns. 5, 6.

[15] N. Y. Revised Stats. of 1829, Part III, c. VIII, Tit. IV, Art. I, §§ 15-30, amended by L. 1840, c. 354, L. 1842, c. 197, L. 1849, c. 107.

[16] L. 1851, c. 479, L. 1859, c. 428, § 1.

[17] *Hulbert* v. *Hope Mut. Ins. Co.* (1850) 4 How. Pr. 274, 276; *Brewster* v. *Mich. Cent. R. R. Co.* (1850) 5 How. Pr. 183, 187; *Bates* v. *New Orleans, Jackson & Great Northern Rd. Co.* (1856) 13 How. Pr. 516, 519-520; *Whitehead* v. *Buffalo & Lake Huron Ry. Co.* (1859) 18 How. Pr. 218, 222-223; *Howell* v. *Chicago & North Western Ry. Co.* (1868) 51 Barb. 378, 383; *Ogdensburgh &c R. R. Co.* v. *Vermont &c R. R. Co.* (1875) 6 Thom. & Cook 488, 491; aff'd on another ground (1875) 4 Hun 712. Dicta to the contrary may be found in *Bank of Commerce* v. *Rutland & Washington Rd. Co.* (1854) 10 How. Pr. 1, 5; *McDonough* v. *Phelps* (1856) 15 How. Pr. 372, 376-377; *Cumberland Coal & Iron Co.* v. *Hoffman Steam Coal Co.* (1859) 30 Barb. 159, 163-164.

[18] L. 1853, c. 463, §§ 14, 15; c. 466, § 23.

[19] L. 1855, c. 279.

this Court in *Bank of Augusta* v. *Earle* (1839) 13 Pet. 519, 588, held that a foreign corporation which did business in New York did not thereby migrate to New York and obtain a residence there.[20] In *Gibbs* v. *Queen Ins. Co.* (1875) 63 N. Y. 114, that Court expressed its views regarding the power of the New York courts to compel foreign corporations doing business in the state to appear before them, and regarding the effect of the designation of a process agent. The case came up on appeal from an order denying the motion of a foreign insurance company to set aside service of process on its designated agent, on the ground that the courts of New York could exercise no jurisdiction *in personam* against any foreign corporation unless it should voluntarily appear, and that service of the summons would be effective only in a case where, and to the extent that, jurisdiction was obtained by attachment. First finding that the Legislature had finally shown an intention to provide for suits *in personam* against foreign corporations, the Court next held that where such a suit was commenced by service on a designated agent, the result was an effective judgment *in personam*. Drawing heavily for analogy on the English cases regarding jurisdiction *in personam* over absent defendants through service on their local agents, the Court held that the designation of a process agent was a consent that the New York courts after notice to the agent could exercise jurisdiction over the defendant, which the Court regarded as absent from the state. The Court said (pp. 128-129):

> "And now I am prepared to ask, would it not be sufficient to confer jurisdiction upon the Supreme

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[20] *Merrick* v. *Van Santvoord* (1866) 34 N. Y. 208, 218-219; *Stevens* v. *Phoenix Ins. Co.* (1869) 41 N. Y. 149, 152.

Court over this defendant, in this case, that the defendant had filed, in some proper place in the jurisdiction, an appointment of an agent, specifying that he was authorized to receive for it the very process issued in this case, and that thereby a suit therein might be commenced against it, and that the Supreme Court had ordered such service to be made, and that such service had been made in accordance therewith? Is it not much more effectual to that end, when the legislature of the State has enacted that the defendant, as a prerequisite to doing business in this State, shall designate an attorney or an agent therein upon whom process in any suit to be commenced against it may be served, and that it has designated a person as such agent, and that service of process against the defendant has been made upon him? *Is not the enactment of the statute by the legislature, a proffer to the defendant of the power to do business in this State, if it will subject itself to the jurisdiction of our courts, and is not the acceptance of that proffer by the defendant a submission to that jurisdiction?* If the defendant had authorized an attorney to appear for it on the record, in the Supreme Court, in this case, it would have been a voluntary appearance and a submission to jurisdiction, and the court would have obtained jurisdiction of the person and could have rendered a judgment in personam. How does it differ in principle that in anticipation of any and all suits which may be brought against it, it nominates a person upon whom service of process against it shall be as effectual as service of the same process upon it? In my judgment the existence of an agent made in that way, for that purpose, and upon such inducement and after such statutory agreement, meets the whole principle upon which rests a substituted service as set forth in the cases above cited."

In 1877, the requirement that foreign corporations desiring to conduct business in New York designate process agents

was repealed,[22] and immediately after, while reaffirming the authority of the *Gibbs* case,[23] the Court in two cases [24] held that by service within the state on an officer of a corporation doing no business and owning no property there, jurisdiction was acquired to render a judgment *in personam*, good at least within the state, although in the second case, the Court went on to expressly warn that it had made no determination regarding the effectiveness of the judgment elsewhere.[25] In *Pringle* v. *Woolworth* (1882) 90 N. Y. 502 the Court, in affirming the validity in New York of a judgment recovered in Pennsylvania against a New York insurance company doing business there under a statute requiring the designation of a process agent,[26] said, referring to *Lafayette*

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[22] A new Code was adopted by L. 1876, c. 448, and amended by L. 1877, c. 416. The requirement of the appointment of process agents for ordinary business corporations was repealed by L. 1877, c. 417, § 29. The requirement of the designation of process agents by foreign insurance companies remained in force (L. 1853, c. 463, §§ 14, 15, c. 466, § 23; L. 1862, c. 300, c. 367, § 5; L. 1875, c. 555, § 1; L. 1884, c. 346, § 1; L. 1892, c. 690, § 30; L. 1910, c. 634, § 12; L. 1937, c. 362). The provision is now contained in § 30 of the New York Insurance Law.

[23] *Hunt* v. *Hunt* (1878) 72 N. Y. 217, 237-238.

[24] *Hiller* v. *Burlington and M. River R. Co.* (1877) 70 N. Y. 223; *Pope* v. *Terra Haute Car Mfg. Co.* (1881) 87 N. Y. 137. In *Grant* v. *Cananea Copper Co.* (1907) 189 N. Y. 241, 250, the Court placed its decision on the federal rule, which it noted to be different from the rule of the *Hiller* and *Pope* cases. *Cf. Riverside & Dan River Cotton Mills* v. *Menefee* (1915) 237 U. S. 189, 192.

[25] 87 N. Y. p. 141.

[26] Although the record in the *Pringle* case did not show that a designation had actually been filed, the Court treated the result as equivalent (90 N. Y. pp. 509-510) and its reasoning, above quoted, is therefore authoritative as a holding regarding the effect of a designation actually filed.

Ins. Co. v. *French* (1856) 18 How. 404 and *Gibbs* v. *Queen Ins. Co., supra* (p. 509):

> "These cases determine that where an insurance company of one State does business in another, under a provision of the statute of the latter State, which makes service of process upon the designated person within such State equivalent to personal service on the corporation, the company is deemed to assent to be bound by a judgment rendered upon such service."

In *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592, in refusing to permit attachment of the stock of a citizen of Pennsylvania in a Pennsylvania corporation by service of the writ on its secretary while present in New York on the corporation's business, the Court of Appeals reaffirmed its adherence to the principle that jurisdiction over foreign corporations depends on, and is limited to, their consent either express, by the designation of a process agent, or implied from doing business in the state. At pages 598-599 the Court said:

> "we regard the principle to be too firmly settled by repeated adjudications of the Federal and State courts, to admit of further controversy, that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction. (*Bank of Augusta* v. *Earle*, 13 Pet. 519; *Lafayette Ins. Co.* v. *French*, 18 How. [U. S.] 404; *Merrick* v. *Van Santvoord*, 34 N. Y. 208; *Stevens* v. *Phoenix Ins. Co.*, 41 id. 150.) * * * *suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, or that the corporate entity attends its officers in their migrations from one State to another, or that it is itself present wherever its property may be, or its business may be transacted. The jurisdiction, as I understand, rests upon the ground that as a corporation must act by agents, it may through its agent subject itself to the jurisdiction of a foreign tribunal.*"

In 1891 the Court of Appeals in *Demarest* v. *Flack*, 128 N. Y. 205 sustaining the dismissal of an action, held that the incorporation of the defendants in West Virginia must be recognized in New York and rejected the plaintiff's contention that since the defendants were all residents of New York, their incorporation in West Virginia to do business in New York was a legal fraud. The previous year the Legislature had adopted a statute called the General Corporation Law,[27] amending, codifying and amplifying the New York law on that subject. Ordinary business corporations incorporated elsewhere were in no way regulated, and the Court held that the Legislature had disclosed a policy permitting foreign corporations to do business here without conditions or restraints. At pages 216-218 the Court said:

> "When they come in our states to do business they must conform to our laws relating to foreign corporations and comply with the terms laid down by us as conditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws, and if there be any kind where none is imposed, it is conclusive evidence that up to this time the legislature has not thought it conducive to the true interests of the state and its citizens to impose them. I do not intimate that it is necessary for a state to expressly by statute exclude foreign corporations from acting within its jurisdiction. The policy of the state may exclude them and that policy may be clearly established by a reference to the general legislation of a state. *I find none such in the laws of this state.*"
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>
> "The supervision of a foreign corporation by this state may easily be exercised by imposing terms as

[27] L. 1890, c. 563, pp. 1060, *et seq.*

a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the legislature to say whether any, and if so what, terms shall be imposed upon such corporations as a condition of granting them permission to do business here. Those terms can only be imposed by the legislature, and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this state and do business here. The courts cannot themselves impose terms or conditions."

The Court's view as to how the situation might be remedied was further clarified by its reiteration of the rule of the *Gibbs* case in its decision in *Teel* v. *Yost*, 128 N. Y. 387, 397, handed down the same day as the opinion in *Demarest* v. *Flack*:

"In Gibbs v. Queens Ins. Co. (63 N. Y. 114) it was held that where a foreign fire insurance company has designated an agent in compliance with the state insurance laws, making the appointment of an attorney or agent in this state, upon whom process in suits against the company may be served, a prerequisite to its doing business in the state, it thereby submits itself to the jurisdiction of the state courts having authority to act; and by service of a summons on an agent so designated, the court acquires jurisdiction and may render a judgment valid and capable of being enforced upon any property within the jurisdiction."

Thus by the failure to enact statutory restrictions on the right of ordinary business corporations to commence and carry on business in the state, New York opened its doors

wide to these concerns, opened its courts to them as plaintiffs and cast at least serious doubt on the power of the New York courts to obtain personal jurisdiction over them as defendants.

These alarming possibilities and the plain hints as to remedy did no longer go unheeded. At the very next session, the Legislature revamped the General Corporation Law, inserting §§ 15-16, quoted above, which forbade foreign corporations to do business until they should have filed a statement showing their authorized powers and purposes and those to be exercised in New York, and designating a process agent. It was under this statute, adopted under these circumstances, that respondent filed the designation here under consideration.

In one further case the Court of Appeals has dealt directly with the nature of a designation. In *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.* (1916) 217 N. Y. 432, decided in the year before respondent filed its designation under the same statute, the defendant sought to limit the effectiveness of service on the designated agent to causes of action arising within the state. The Court overruled this contention, holding that the designation was a contractual submission to the jurisdiction of the courts, saying through Judge Cardozo (p. 437):

> "The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject matter. It means that whenever jurisdiction of the subject matter is present, service on the agent shall give jurisdiction of the person."

Since, as pointed out *supra*, page 2, the cause of action here asserted arose in New York, and is against a corporation doing business in New York, its subject-matter is within the jurisdiction of the courts (N. Y. Gen. Corp. Law,

§ 225) and thus within the scope of the consent arising from respondent's designation.

C. The submission to personal jurisdiction effected by the designation waived the venue restriction.

Ex parte Schollenberger (1878), 96 U. S. 369, is direct authority that respondent, by designating a process agent under the New York statute, has waived the venue defense. As the Court said (pp. 376-377):

> "It was insisted in argument that the statute confines the right of suit to the courts of the State; but we cannot so construe it. * * * While the Circuit Court may not be technically a court *of*[28] the Commonwealth; it is a court *within*[28] it; and that, as we think, is all the Legislature intended to provide for."[29]

In that case, a group of foreign insurance companies which had designated process agents under a Pennsylvania statute imposing this requirement as a condition of authority to do business in the state, were sued originally in a federal court in Pennsylvania upon process served on their designees. When the case came up, the original venue restriction of the

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[28] Emphasis by the Court.

[29] The Court continued:

> "States cannot by their legislation confer jurisdiction upon the courts of the United States; neither can consent of parties give jurisdiction when the facts do not; but both state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. * * *"

Judiciary Act of 1789 was in force,[30] limiting the power of the courts to compel defendants to appear before them to inhabitants of the district and persons

> "*found* [therein] *at the time of serving the writ,* • • •"

"Found" as thus used in 1789 by the First Congress evidently meant "physically found by the officer serving the writ." While an individual could be physically present for service of process, a foreign corporation could not. In *Bank of Augusta* v. *Earle, supra,* this Court had said (13 Pet. p. 588):

> "• • • a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceased to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

When the *Schollenberger* case was decided, this principle was being applied in all its force, and the Court made it clear that it regarded foreign corporations as incapable of being physically found (96 U. S., pp. 377-378):

> "A corporation cannot change its residence or its citizenship. It can have its legal home only at the

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[30] The original venue clause is quoted *supra,* p. 9. The only changes made by the Act of 1875 were substitution of the words "any person" in place of "an inhabitant of the United States" and "such process" in place of "the writ". The first change only expressed what had been interpreted as the true meaning of the original enactment (*Toland* v. *Sprague, supra*).

> place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws. Under such circumstances, it seems clear, that it may, for the purpose of securing business, *consent to be 'found'* away from home, for the purposes of suit as to matters growing out of its transactions. The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and *it is one which he may waive.* If the citizenship of the parties is sufficient, *a defendant may consent to be sued anywhere he pleases,* and certainly jurisdiction will not be ousted because he has consented."

Earlier in the opinion, the Court said (96 U. S. p. 376) referring to its decision in *Railroad Co* v. *Harris* (1871), 12 Wall. 65:

> "The company objected to the jurisdiction of the court, and insisted that it was neither an inhabitant of nor found within the District. In ruling upon this objection, we held that, although the company was a foreign corporation, it was suable in the District, *because it had in effect consented to be sued there,* in consideration of being permitted by Congress to exercise therein its corporate powers and privileges. The language of the court, speaking through Mr. Justice Swayne, is: 'It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that *it shall consent to be sued there.*'
>
> "Applying these principles to the present case, there cannot be any doubt, as it seems to us, of the jurisdiction of the Circuit Court over these defendant companies. *They have,* in express terms, in consideration of a grant of the privilege of doing busi-

ness within the State, *agreed that they may be sued there;* that is to say, that they may be *found*[31] there for the purpose of the service of process * * *"

When the Court referred to the defendants as being found by reason of their consents, it obviously did not mean that they had come within the terms of the statute by being actually found, but that since they had agreed to appear after notice of suit left with their designees, they could be treated *as if* they were individuals actually found: they were before the Court—it could exercise its power over their persons. And having placed themselves in that position, they could no longer avail themselves of the statutory limitations on the Court's power to compel defendants to appear before it.

Since the 1887 amendment, parties can be sued generally only in the district of their inhabitance, and in diversity cases, where found in another district only if the plaintiff is a resident of such district. In 1892 this Court held in two cases that this prevented a non-resident from suing a foreign corporation in a district in which it was doing business. (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.) In the first case, no condition was imposed on the doing of business in the state by foreign corporations.[32] In the second, a statute had been passed requiring the filing of a designation. Each of these cases, we submit, was erroneous on principle for two reasons.

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[31] Emphasis by the Court.

[32] *Shaw* v. *Quincy Mining Co.*; a suit in the Circuit Court for the Southern District of New York, was commenced before the adoption of §§ 15-16 of the Gen. Corp. Law, quoted above. The situation as to the corporation's consent was thus as pointed out in *Demarest* v. *Flack*, discussed *supra*, pp. 18-20. The holding in the *Shaw* case may be sustained on that ground alone.

First. In each case the Court assumed that *Ex parte Schollenberger* had been decided on the basis that the defendants were found within the district. Since, the Court then reasoned, the 1887 amendment omitted the provision that a defendant could be sued by a non-resident plaintiff in a district wherein he was found, the amendment rendered the *Schollenberger* case no longer authoritative. Thus in the *Shaw* case, the Court said (145 U. S., p. 452):

> "The jurisdiction of the circuit court in that [Schollenberger] case, as well as in New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138, 146, was maintained upon the ground that the defendant corporation, though incorporated in another State, yet, by reason of doing business in the State in which the suit was brought, and having appointed an agent there as required by its laws, upon whom process against the company might be served, was found in that State, within the meaning of the Act of March 3, 1875, chap. 137, § 1, then in force, and hereinbefore cited.
>
> "The statute now in question, as already observed, has repealed the permission to sue the defendant in a district in which he is found • • • "[33]

In the *Denton* case, the *Shaw* case was expressly followed on the point (146 U. S., p. 205):

> "The case is governed by the decision of this court at the last term, by which it was adjudged that the Act of 1887, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found', requires an action at law, the jurisdiction of which is founded only upon

[33] *New England Mut. L. Ins. Co.* v. *Woodworth*, cited by the Court, did not deal with the subject of venue. See discussion of that case, *infra*, p. 43.

> its being between citizens of different states, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident; and that a corporation cannot, for this purpose, be considered a citizen or a resident of a State in which it has not been incorporated. Shaw v. Quincy Mining Co., 145 U. S. 444, 449, 453."

But as shown above, the *Schollenberger* decision rested, and necessarily rested, not on the defendants being actually found in the district but upon their having brought themselves before the Court and having thereby waived the right to assert limitations on the power of the Court to compel them to come before it. That waiver, once given, was effective with respect to whatever limitations there were, whether dependent on the defendant's inhabitancy or presence in the district, under the original Judiciary Act, or also, in a diversity case, on the residence of the plaintiff, under the 1887 amendment. The 1887 amendment, varying these limitations, could not detract from the effect of an agreement which brought the defendants into court, thus waiving any and all restrictions on the power of the court to compel them to appear there. That agreement, held in the *Schollenberger* case to have waived the 1789 requirement that the defendant be an inhabitant or found within the district, on principle was equally effective under the 1887 amendment, which, in a diversity case, permitted a non-resident defendant found in the district to be sued only by a resident plaintiff.

Second. The *Shaw* and *Denton* cases each depends on two principles fundamentally inconsistent with each other. In the *Shaw* case, the Court, as authority for its holding that the defendants could have no inhabitance outside of the states in which they were incorporated, relied on the

principle laid down in *Bank of Augusta* v. *Earle* that a corporation could have no existence outside of such state. After quoting Chief Justice TANEY's famous dictum in that case set forth *supra*, p. 22, the Court said (145 U. S., p. 450):

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other states whose laws permit it."

Nevertheless the Court permitted the Quincy Mining Company to interpose the venue defense, thus necessarily holding that the consent of a foreign corporation is a mere consent to be found for service of process: something less than a consent to appear, leaving it open to the corporation when served, to object to the means taken to bring it before the court. In the *Denton* case, the two inconsistent propositions were expressed as follows (146 U. S. pp. 207-208):

> "Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. * * * The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. Lafayette Ins. Co. v. French, 59 U. S. 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the State—so long as the judiciary acts of the United States allowed it to be sued in the district in which it was found. Ex parte Schollenberger, 96 U. S. 369; New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138; Re Louisville Underwriters, 134 U. S. 488. But such an agreement could not, since Congress (as held

in Shaw v. Quincy Mining Co. above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a circuit court of the United States."[34]

But under Chief Justice TANEY's concept, anything less than a consent to be sued would be ineffective to bring a corporation into any court outside of its state of origin, when sued by any plaintiff, resident or non-resident. Thus the *Shaw* and *Denton* decisions are each internally inconsistent, as well as incorrect in supposing that the *Schollenberger* case was or could be based on a consent to be "found" or "served" and nothing more.

The distinction between the express contractual consent arising from the voluntary designation of a process agent and the legal fiction of consent implied against a foreign corporation which does not designate a process agent, although not referred to in the *Shaw* and *Denton* cases, was expressly taken by this Court in *Penn. Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.* (1917) 243 U. S. 93. In that case the Court refused to regard as applicable to a case where express consent to be sued had been given through the designation of a process agent, the rule of *Old Wayne Mutual Life Assn.* v. *McDonough* (1907) 204 U. S. 8 and *Simon* v. *Southern Ry. Co.* (1914) 236 U. S. 115, where

[34] In *In re Louisville Underwriters*, it was held (1) that the venue clause was not applicable to suits in admiralty; (2) that by reason of the consents arising from their designation of process agents, the defendant foreign corporations could be sued in a federal court of the state where the designations were filed.

it was said of a corporation which had not designated a process agent (236 U. S. p. 130):

> "the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

In the *Penn. Fire Ins. Co.* case this Court held the defendant foreign corporation subject to a broader liability to suit because of its designation, saying (243 U. S. p. 95):

> "If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

Thus the construction given to the fiction of consent implied against a foreign corporation which does business in a state without designating a process agent will not determine the construction to be given to the express consent to be sued which results where a process agent is designated. That is a voluntary contract to appear in the courts after notice to the designee, which must be given effect in accordance with the expressed intention of the parties. As decided in the *Schollenberger* case, respondent, by designating a process agent under the New York statute, has agreed, after notice to its designee, to appear in any New York court, state or federal, having jurisdiction of the sub-

ject matter, and has waived the right to assert the restrictions of the venue statute on the power of the Court below to compel it to appear.[35]

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[35] Since the 1887 amendment the *Schollenberger* case has been followed in *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.* (C. C. A. 10, 1939) 100 F. (2d) 770, cert. granted 306 U. S. 629; *Shainwald* v. *Davids* (D. C. N. D. Cal. 1895) 69 Fed. 704; *Consol. Store-Service Co.* v. *Lamson Consol. Store-Service Co.* (C. C. Mass. 1890) 41 Fed. 833. The holding of the *Consolidated Store-Service Co.* case on this point was expressly approved by the First Circuit Court of Appeals in *Haight & Freese* v. *Weiss* (1907) 156 Fed. 328, 329-330. The same result was reached in *Dodge Mfg. Co.* v. *Patent* (D. Ind. 1928) 23 F. (2d) 852, affirmed on the ground that the corporation had become a resident (C. C. A. 7, 1932) 60 F. (2d) 676, discussed *infra*, p. 52, note 50.

Under the Act of August 13, 1894, c. 282, § 2, 28 Stat. 279, 6 U. S. C. A. 7 requiring companies desiring to act as surety on bonds for federal improvements to designate process agents, such designation enables a non-resident surety to be sued by a non-resident plaintiff (*U. S.* v. *Sheridan* (W. D. Ky. 1902) 119 Fed. 236).

The *Denton* case has been expressly followed regarding the effect of a designation as a waiver of the venue defense in *McLean* v. *Mississippi* (C. C. A. 5, 1938) 96 F. (2d) 741 cert. denied 305 U. S. 623; *Hamilton Watch Co.* v. *George W. Borg Co.* (N. D. Ill. 1939) 27 F. Supp. 215; *Standard Stoker Co.* v. *Lower* (D. Md. 1931) 46 F. (2d) 678; *Platt* v. *Mass. R. E. Co.* (D. Mass. 1900) 103 Fed. 705. That no waiver results from the designation of a process agent was held in *Beech-Nut Packing Co.* v. *P. Lorillard Co.* (S. D. N. Y. 1921) 287 Fed. 271 on the authority of the *Shaw* case and in *Heine Chimney Co.* v. *Rust Engineering Co.* (C. C. A. 7, 1926) 12 F. (2d) 596 on the authority of *In re Keasbey & Mattison Co.* (1895) 160 U. S. 221. It is difficult to see how any waiver could have arisen in the *Heine Chimney Co.* case since that was a suit for patent infringement and the state courts had no jurisdiction of the subject-matter (Judicial Code, § 256, 28 U. S. C. A. 371[5]).

The Texas statute considered in the *Denton* case is unlike the Pennsylvania statute construed in the *Schollenberger* case and the New York statute under which respondent filed its designation here. In the Texas statute, an attempt was made to curtail the jurisdiction of the federal courts as local courts in diversity cases by a provision that any foreign corporation removing a case should lose its authority to do business in the state. In enacting §§ 15-16 of the General Corporation Law, the New York Legislature expressly rejected a proposal to include a similar provision. Instead, the law passed merely referred in general terms to service in suits against the designating corporation, like the Pennsylvania statute which this Court in the *Schollenberger* case had held fully applicable to the local federal courts. The *Denton* case, therefore, confined to what was there considered, is not authority against the proposition that respondent's designation under the New York statute waived the federal venue defense.[36]

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[36] The Texas statute, L. 1887, c. 128, because of the provision against removals, was declared unconstitutional by the Supreme Court of Texas two years before the *Denton* case reached this Court (*Texas Land & Mtg. Co.* v. *Worsham* (1890) 76 Tex. 556, 13 S. W. 1384). It had been repealed three years before (L. 1889, c. 78, § 2). In the *Denton* opinion itself, before expressing itself as quoted at pp. 27-28 above regarding the effect of a designation thereunder, this Court declared the statute "unconstitutional and void". For that reason, held the Court (146 U. S. p. 207)

> "it could give no validity or effect to any agreement or action of the corporation under obedience to its provisions."

The New York Legislature took the action above described on May 18, 1892, six months before this Court handed down

II

Bethlehem is an inhabitant of the Southern District of New York within the meaning of the venue provision.

The question here presented, whether a corporation incorporated under the laws of a state in which none of its business is done, and having its executive office in another state, is an inhabitant of the latter state within the meaning of § 51 of the Judicial Code, has never been decided by this Court.

The answer depends on the meaning to be ascribed to the word "inhabitant" in the provision that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." That is a reenactment of the venue clause of the Judiciary Act of 1789, which has been in force by successive reenactments continuously since 1789.[37] While other portions of the statute have been eliminated and new words added by subsequent amendments, the clause in question has been continued in precisely the same language as that in which it was orig-

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its opinion in the *Denton* case on November 21, 1892. See Birdseye, Cummings & Gilbert's N. Y. Consol. Laws, vol. 2, p. 1979.

The Pennsylvania statute considered in the *Schollenberger* case is printed in the appendix.

[37] Sept. 24, 1789, c. 20, § 11; Rev. Stat. § 739; Mar. 3, 1875, c. 137, § 1, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1, 24 Stat. 552; Aug. 13, 1888, c. 866 § 1, 25 Stat. 433; Mar. 3, 1911, c. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, c. 345, 42 Stat. 849; Mar. 4, 1925, c. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, c. 230, 49 Stat. 1213.

inally enacted. The language of the provision must therefore have the same meaning as in 1789.

A. "Citizen" in the jurisdiction clause and "inhabitant" in the venue clause are not synonymous. In the two clauses Congress deliberately used a different word to convey a different meaning.

That the word "inhabitant" was intended to convey a different and broader meaning than the term "citizen" becomes clear upon studying the language of the provision as originally enacted, either separately or in its context, and in the light of its object and purpose.

The word "inhabitant" on its face has a meaning different from the word "citizen". The use of "citizen" in one clause and "inhabitant" in a following clause itself raises a presumption that the two different words were used in two different meanings. That they were so used was held by Mr. Justice STORY in *Picquet* v. *Swan, supra,* 5 Mason p. 46, and by this Court in *Toland* v. *Sprague, supra,* and in *Galveston, &c. Ry. Co.* v. *Gonzales* (1894) 151 U. S. 496, 500, and has been recognized in other decisions of this Court.[38]

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[38] In *Toland* v. *Sprague, supra,* it was held that a citizen of the United States residing in Gibraltar was not an inhabitant of the United States. In *Steigleder* v. *McQuesten* (1905) 198 U. S. 141, the Court said (p. 143):

> "But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the circuit courts of the United States; and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purposes of jurisdiction." (Citing cases.)

To the same effect, see *Pioneer Southwestern Stages, Inc.* v. *Wicker* (C. C. A. 9, 1931) 50 F. (2d) 581, 582.

In *Grace* v. *American Central Ins. Co.* (1883) 109 U. S. 278, the Court held an allegation that defendant partnership is doing business in New York and is composed of individuals who are residents of a state other than that of which plaintiff is a citizen insufficient to establish defendants' citizenship, saying (p. 284):

> "The record, however, fails to show of what state the defendants are citizens. They may be doing business in and have a residence in New York without, necessarily, being citizens of that state."

Additional evidence that the word "inhabitant" in the second clause was not used in the restrictive sense of the word "citizen" in the first clause is found in the fact that the phrase "whereof he is an inhabitant" was coupled with the phrase "or in which he shall be found at the time of serving the writ." If the venue provision had been intended to operate as narrowly as the jurisdiction provision, the last mentioned words would not have been added. Read together the two phrases disclose the original intent of Congress that the circuit court in any district should have jurisdiction over the persons of all defendants residing there or present there for the service of process. It was intended to exempt only those defendants who neither resided in the district nor could there be served with process.

This intent is further evidenced by the fact that the clause in question is supplementary to the preceding provision that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court." The purpose of the original venue provision was to protect parties from being sued in districts distant from their homes. The venue provision was enacted as an incident to the territorial limitation on the jurisdiction of

the federal courts. Congress might have given each circuit court, in cases within its jurisdiction, power to let its process run throughout the United States. Instead it limited their process to run only against persons within the district; and it was for this reason that the venue provision was enacted, authorizing each court to adjudicate only over those who were inhabitants of the district or found therein.[39] Since until the amendment of 1887 it was sufficient if a defendant was either an inhabitant of the district or found therein, there was no occasion before that time to consider what was the distinction between those two terms. It would seem that a person was found in a district if he was there present even temporarily so that he could be served with process, whereas inhabitancy denoted presence of a more regular and perma-

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[39] It was so held in *Toland* v. *Sprague, supra,* where the Court said (12 Pet. pp. 328, 329):

> "Congress might have authorized civil process from any circuit court to have run into any State of the Union. It has not done so * * *. We think that the opinion of the Legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor."

And the Court based its decision upon the following conclusions (p. 330):

> "1st. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2d. That independently of positive legislation the process can only be served upon persons within the same districts * * *"

nent character.[40] There is nothing to indicate that either term was used as synonymous or co-extensive with the term "citizen" in the preceding clause prescribing the jurisdiction of the federal courts.

On the contrary, the two clauses were enacted for entirely different purposes. The first clause (corresponding to § 24 of the Judicial Code) dealt with the jurisdiction of the federal courts as to subject-matter; the second clause (corresponding to § 51 of the Judicial Code) dealt with jurisdiction over the person, prescribing the district in which a defendant might be sued in a federal court having jurisdiction of the subject-matter.[41] Jurisdiction of a federal court

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[40] This view was taken by Mr. Justice STORY in holding in *Picquet v. Swan, supra* (5 Mason p. 46), that Congress did not intend to subject to the jurisdiction of the federal courts aliens who could not be served with process:

> "My opinion is, that no suit should lie against any person, who was not locally present, either as an inhabitant, or in transitu in the United States; and that it designedly enlarged the power to proceed in cases of inhabitancy, where the party happened at the time to be absent without any intentional change of domicile, as well as allowed it in any district, where the party might, at the time, be found. * * * Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, animo manendi, quite another."

Cf. *Holmes* v. *Oregon & California Ry. Co.* (D. C. Or. 1881) 5 Fed. 523, 526, 527; *Bicycle Stepladder Co.* v. *Gordon* (C. C. Ill. 1892) 57 Fed. 529, 531; *Marks* v. *Marks* (D. C. Tenn. 1896) 75 Fed. 321, 324, 325, 331, 332.

[41] The distinction between jurisdiction and venue was taken at an early date by MARSHALL, C. J., in *Gracie* v.

over the subject-matter in diversity of citizenship cases depended on the citizenship of the parties; jurisdiction over the person by the federal court in a particular district

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Palmer, supra (8 Wheat., p. 699), holding that it was unnecessary to aver on the record that defendant was an inhabitant of the district or was found therein:

> "That it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties."

In *Toland* v. *Sprague, supra,* the venue provision was held to be based on the principle that (12 Pet., p. 329)

> "Nothing can be more unjust than that a person should have his rights passed upon, and finally decided by a tribunal, without some process being served upon him by which he will have notice, which will enable him to appear and defend himself."

and was, therefore, applicable to a citizen of Massachusetts domiciled in Gibraltar and therefore not an inhabitant of the United States, since with respect to those who were not inhabitants of the United States

> "it was not in the contemplation of Congress that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, *could not be served upon them* * * *"

The Court speaks of those not inhabitants as (p. 330)

> "those whom the Legislature did not contemplate as being *within the reach of the process of the courts,* * * *"

The Court further said (p. 331):

> "The court had jurisdiction over the parties and the matter in dispute; the objection was that the party defendant, not being an inhabitant of Pennsylvania,

depended on the defendants being inhabitants of the district or found therein.[42]

The assumption that inhabitancy in a district for the purpose of venue is synonymous with and dependent upon citizenship of the state for the purpose of jurisdiction is

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nor found therein, *personal process could not reach him;* * * *"*

In *Western Loan & Savings Co.* v. *Butte & Boston Consol. Mining Co.* (1908) 210 U. S. 368, 372, holding that the objection to venue was waived by appearance and pleading, the Court said (p. 372):

> "We are of opinion that the defendant had waived objection to *jurisdiction over its person,* and, by filing the demurrer on the ground stated, *submitted to the jurisdiction* of the Circuit Court."

In *Seaboard Rice Milling Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1926) 270 U. S. 363, 366, the Court said of the argument that a case cannot be removed to a federal court unless it could have been brought in the federal court in the first instance:

> "The fallacy of this argument lies in the failure to distinguish between the general jurisdiction of the district courts, to which § 28 relates, and *the local jurisdiction over the person of the defendant,* to which § 51 relates."

See also *Interior Construction & Imp. Co.* v. *Gibney, Macon Grocery Co.* v. *Atlantic Coast Line* and *Camp* v. *Gress,* quoted from *supra,* p. 10, holding that the venue clause relates only to jurisdiction over the person of the defendant, as distinct from jurisdiction of the subject-matter.

[42] Failure at times to recognize the fundamental distinction between the jurisdiction clause and the venue provision has resulted in some confusion in the opinions of this Court. So recently as 1923 the Court found it necessary expressly to overrule, on that ground, its prior decision in *Ex parte Wisner.* See note 11, *supra,* p. 9.

thus contrary to the language of the statute and to its objects as stated by this Court. Consequently it does not follow from the rule established by decisions of this Court holding a corporation, for the purpose of the jurisdiction of federal courts as such, to be a citizen of the state of its incorporation and of no other state, that a corporation is, for the purpose of the venue provision, an inhabitant or resident of the state of its incorporation and of no other state.

B. This Court has never decided the question here presented, whether a corporation incorporated on paper in one state, where it does no business, is an inhabitant of another state, where it has its business headquarters, where its directors meet, its chief executives have their offices, and where it is permitted by both states to do business. All that has actually been held by this Court is that for venue purposes, a corporation incorporated in one state, where it does some of its business, does not become an inhabitant of another state by doing a part of its business there. A holding that respondent is an inhabitant of the Southern District of New York is not inconsistent with anything decided by this Court and is required by the intention of Congress expressed in the statute.

This Court has gone no further in its actual decisions than to hold that a corporation incorporated in one state is not an inhabitant of another state merely because it does business there—in other words, that a corporation is not an inhabitant of every state in which it does business, irrespective of the amount and character of that business. This Court has never held that a corporation which, like respondent here, has merely a paper incorporation in a state in

which it does no business, is not an inhabitant of the state in which its principal executive offices are located and where in a real sense it has its business situs.

The Judiciary Act did not mention corporations. Its language on its face applied only to individuals. Whether since in 1789 corporations were not a factor, Congress did not at that time contemplate them as parties to suits in the federal courts, or whether Congress deliberately left it to this Court to apply to corporations by analogy the rules laid down for individuals, is immaterial, since in either view it has fallen to this Court to decide how the principles expressed in the statute are applicable by analogy to corporations.

The application of the Act to corporations has occasioned much difficulty. This Court has found it necessary from time to time to change its point of view, and to disregard general language found in earlier opinions not necessary to the point decided. At an early day it held that a corporation is not a citizen within the meaning of the provision of the constitution entitling citizens of a state to the privileges and immunities of citizens in other states.[43] In order to hold that a corporation can nevertheless sue and be sued in the federal courts under the diversity of citizenship clause of the Judiciary Act, the Court at first disregarded the corporate entity entirely and made the jurisdiction of the federal courts depend upon the citizenship of its members,[44] but soon abandoned this theory for a double fiction, *viz.*, that a corporation merely represents its stockholders and that they are presumed to be citizens of the state of incor-

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[43] *Insurance Co.* v. *French*, *supra*; *Paul* v. *Virginia* (1869) 8 Wall. 168.

[44] *Bank of U. S.* v. *Deveaux* (1809) 5 Cranch 61.

poration.[45] Since then, the Court has abandoned these fictions, and has established the principle that a corporation has a separate existence apart from its members.[46] The rule established by this Court that, for purposes of diversity of citizenship jurisdiction, a corporation is to be regarded as a citizen of the state of its incorporation, rests, it is submitted, on a more practical foundation than a resort either to the fiction that a corporation represents its members or to the fiction that a corporation is a citizen. Congress intended that the federal courts should have jurisdiction over all suits between citizens of different states; to exempt corporations from federal jurisdiction would obviously defeat that purpose; and since a simple criterion of jurisdiction is contemplated, corporations are regarded by analogy as if they were citizens of the state of incorporation, for purpose of federal jurisdiction.[47]

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[45] *Railroad Co.* v. *Letson* (1844) 2 How. 497; *Marshall* v. *Railroad Co.* (1853) 16 How. 314, 327, 328; *Muller* v. *Dows* (1877) 94 U. S. 444.

In *Doctor* v. *Harrington* (1905) 196 U. S. 579, 586, 587 the Court spoke of "the assumption adopted by this court, that stockholders of a corporation are citizens of the state which created the corporation, an assumption physically possible, but hardly true in a single instance;" explained that the fiction had been devised for the purpose of permitting corporations to be sued in federal courts though not citizens, and said: "This, then, was its purpose, and to stretch beyond this is to stretch it to wrong."

[46] *Donnell* v. *Herring-Hall-Marvin Safe Co.* (1908) 208 U. S. 267, 273; *Klein* v. *Board of Tax Supervisors* (1930) 282 U. S. 19, 24.

[47] Substantially this view is indicated by opinions of this Court. In *Paul* v. *Virginia, supra,* it was held that a corporation is not a citizen but that (8 Wall. pp. 177-178):

> "where contracts or rights of property are to be enforced by or against corporations, the courts of the

The assumption that a corporation cannot be an inhabitant of a state other than that of its incorporation, found in general expressions of this Court, is based on the fiction mentioned above with respect to the citizenship of corporations, extends that fiction beyond its original purpose, and arises from the failure to recognize the essential difference between the jurisdiction provision and the venue provision.

While the question whether a corporation can be an inhabitant of a state other than that of its creation had never been passed upon by this Court before the decision in 1892 of *Shaw* v. *Quincy Mining Co., supra,* upon which respondent chiefly relies, earlier decisions had appeared to indicate an affirmative answer. In *Railroad Co.* v. *Harris, supra,* the Court held a railroad corporation incorporated in Maryland but extending its lines into the District of Columbia under an Act of Congress authorizing it to do so, suable in the courts of the District of Columbia under a provision of the Act authorizing suit against a defendant who was an inhabitant of or found in the District in substantially the same language as the venue provision. The Court said:

> "Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, *a corporation of its own quoad hoc any property within its territorial jurisdiction.*"

> United States will, for the purpose of maintaining jurisdiction, * * * treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States."

In *Railroad Co.* v. *Harris, supra,* the Court said (12 Wall., pp. 81-82):

> "For the purposes of federal jurisdiction it [the corporation] is *regarded as if it were a citizen of the state where it was created,* * * *"*

In Ex parte Schollenberger, supra, the Court expressly left open the question whether a New York insurance corporation licensed to do business in Pennsylvania and designating an agent for service of process there could be regarded as an inhabitant of Pennsylvania, within the meaning of the venue provision (96 U. S. p. 375). In *Railroad Co.* v. *Koontz* (1881) 104 U. S. 5, 12, the Court said, while holding that a Maryland railroad corporation operating a leased line in Virginia did not thereby become a citizen of Virginia, and could remove a suit against it by citizens of Virginia in the Virginia State Court to the federal court:

> "A corporation may, for the purposes of suit, be said to be born where by law it is created and organized and to reside *where by or under the authority of its charter its principal office is.* • • • It cannot migrate nor change its residence *without the consent, expressed or implied, of its State,* but it may transact business wherever its charter allows, unless prohibited by local laws."

In *New England Mut. Life Ins. Co.* v. *Woodworth, supra,* it was held that a Massachusetts insurance company doing business in Illinois with an agent designated pursuant to statute, had a domicile in Illinois so that its indebtedness on a life insurance policy issued in Michigan to a resident of Michigan was assets in Illinois entitling the policyholder's personal representative to take out letters of administration in Illinois and bring suit there. The Court, after referring to the laws of Illinois requiring the designation of an agent for service of process as a condition of doing business, said (111 U. S. p. 145):

> "In view of this legislation and the policy embodied in it, when this corporation, not authorized under the laws of Illinois, has, by virtue of those laws a place of business in Illinois and a general agent there, and a resident attorney there for the

> service of process and can be compelled to pay its debts there by judicial process and has issued a policy, payable on death, to an administrator, *the Corporation must be regarded as having a domicile here*, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there."

This was the state of the decisions of this Court when *Shaw v. Quincy Mining Co.* was decided. Shortly before that case was argued, Mr. Justice HARLAN, sitting at circuit, had presented to him the question whether a corporation was an inhabitant, within the meaning of the venue statute, of a state other than that of its incorporation in which it maintained an office and transacted business (*U. S.* v. *Southern Pacific R. Co.* (C. C. N. D. Cal. 1892) 49 Fed. 297). He reviewed the authorities and found that the decisions of this Court had left the question open. He said (p. 302):

> "A corporation of one state, by engaging in business or acquiring property in another state, does not thereby cease to be a citizen of the state creating it (Insurance Co. v. Francis, 11 Wall. 210) although, while the Act of 1875 was in force, it could be 'found' in any state where it did business regularly by its agents, process being served upon such agents. Ex parte Schollenberger, 96 U. S. 369. In the latter case the court was careful to say that it was unnecessary to inquire whether such a corporation was not also, within the meaning of the Act of 1875 an inhabitant of the state in which it did business."

His conclusion was as follows (pp. 303-304):

> "If it be said that inhabitancy in a state, in its strict legal sense, implies a permanent, fixed residence in that state, the answer is that a corporation of one state, operating, by agents, a railroad or a telegraph line in another state, with its consent, or under its license, may be regarded as permanently

identified with the business and people of the latter state, and, for the purposes of its business there, to have a fixed residence within its limits; for it may not unreasonably be assumed that it will exert its powers there during the whole of its corporate existence, or so long as it is profitable to do so. It does there just what it would do if it had received its charter from that state. It seems to the Court that a corporation of a state, or a corporation of the United States, holding such close relations with the business and people of another state, may, within a reasonable interpretation of the Act of 1887, be deemed an 'inhabitant' of the latter state for all purposes of jurisdiction *in personam* by the courts held there; although a corporation is, and, while its corporate existence lasts must remain, a 'citizen' only of the state which gave it life."

In *Shaw* v. *Quincy Mining Co., supra,* the Court held that a Michigan mining corporation, conducting its mining operations in Michigan and having business offices in New York and Michigan, was not an inhabitant of New York within the meaning of the venue provision, and that therefore the Circuit Court for New York could not acquire jurisdiction of it by service upon its secretary in New York at the suit of a citizen in Massachusetts. The Court held that the term "inhabitant" was used in the statute as synonymous with the term "citizen", and since it had been established by the decisions of the Court that a corporation was to be treated for purposes of jurisdiction as a citizen of the state of its incorporation and of no other state, it necessarily followed that it likewise could not be an inhabitant of any other state. The premise that the term "inhabitant" was synonymous with the term "citizen" was set up as follows, referring to the Judiciary Act of 1789 (145 U. S. p. 447):

"The word 'inhabitant,' in that Act was apparently used, not in any larger meaning than 'citizen'

> but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State, like the two districts of Maine and Massachusetts in the State of Massachusetts, and the districts of Virginia and Kentucky in the State of Virginia, established by § 2 of the same Act."

The broad general principle enunciated in the opinion, and repeated in subsequent opinions, rests entirely on this premise. Having assumed this relationship between the terms "inhabitant" and "citizen", the Court, applying the statement in *Bank of Augusta* v. *Earle, supra,* that a corporation cannot exist outside of the state of its incorporation, arrived (145 U. S. p. 450) at the general conclusion (quoted *supra,* p. 27) that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of a corporation can only be in the state by which it was created, although it may do business in other states.

This general proposition was broader than the facts of the case required, and was broader than was warranted by previous decisions. As shown above, the question whether a corporation could be an inhabitant of a state other than that of its incorporation had never been passed upon by this Court; its previous holdings having been as to citizenship. From an early date, in cases regarding individuals, this Court had recognized a distinction between citizenship and inhabitancy. The identification of citizenship with inhabitancy, suggested for the first time in the *Shaw* case, more than a hundred years after the enactment of the Judiciary Act, rests upon an assumption as to what Congress had "apparently" intended, an assumption not borne out by any reference to authority or reason, or to anything in the history of the Act. Doubt on the part of the Court as to

the validity of this assumption is indicated by the sentence immediately following that setting forth the assumption and quoted above, recognizing that this Court had held that

> "in the common use of words, a resident might not be a citizen * * *."

The opinion fails, however, to give any adequate reason for thus departing from the presumption that Congress employed the term "resident" in its "common use".

The assumption is contrary to the view of Mr. Justice STORY, repeatedly approved by this Court, that citizenship on the one hand and inhabitancy or residence on the other hand, have different meanings. And it ignores the essential difference between the objects and purposes of the jurisdiction provision and the venue provision, recognized by this Court prior to the decision in the *Shaw* case and subsequently expressly reaffirmed by repeated decisions of this Court.[48]

Mr. Justice HARLAN dissented in the *Shaw* case, and that the majority of the Court may have had some doubt as to the soundness of the general propositions set forth in the opinion is indicated by the care with which, in closing, it declared that the effect of its decision was to be confined to the matter actually decided, saying (145 U. S. p. 453):

> "All that is now decided is that under the existing Act of Congress a corporation incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another

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[48] Cf. *Camp* v. *Gress, supra,* where the Court on an analogous question apparently indicated doubt as to the correctness of the assumption in the *Shaw* case that the construction of the venue clause is to follow the construction of the jurisdiction clause (250 U. S. p. 312).

> State in which it has a usual place of business, to a civil suit at law or in equity brought by a citizen of a different State."

The general principle expressed in the *Shaw* case has been repeated in four other decisions of this Court, none of which, however, actually decided anything more than was decided in the *Shaw* case, *viz.*: that a corporation does not become an inhabitant of a state other than that of its incorporation by merely doing some of its business in the former. In *Southern Pacific Co.* v. *Denton, supra*, a Kentucky railroad corporation running its cars through Texas was held not suable in the Circuit Court for the Western District of Texas at the suit of a resident of the Eastern District of Texas. The Court (146 U. S. p. 205) followed the *Shaw* case, stating (as quoted *supra*, pp. 25-26) that for the purpose of the requirement of the venue clause as amended in 1887 that one of the parties to a diversity suit be an inhabitant of the district, a corporation can not be considered a citizen or a resident of a state in which it has not been incorporated. In *In re Keasbey & Mattison Co.* (1895) 160 U. S. 221, the Court held that a Massachusetts corporation doing business in New York and having there an office and a general agent could not be sued by a Pennsylvania corporation in a Circuit Court for New York. It does not appear where the cause of action originated. The Court again followed the *Shaw* case, stating the rule as follows (p. 229):

> "And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be com-

> pelled to answer to a civil suit at law or in equity, in a circuit court of the United States held in another state, even if the corporation has a usual place of business in that state."

In *Macon Grocery Co.* v. *Atlantic Coast Line, supra*, 215 U. S. p. 508, the Court held on the authority of the *Keasbey & Mattison Co.* case that railroad companies incorporated in states other than Georgia but operating in Georgia were not inhabitants of Georgia within the meaning of the venue provision. In *Seaboard Rice Milling Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1926) 270 U. S. 363, 366, the Court held that a corporation organized under the laws of Illinois and Iowa, having its principal office in Chicago and a branch line in Missouri, could not be sued in a District Court for Missouri by a Texas corporation,

> "a corporation being, within the meaning of the jurisdictional statutes, a resident of the state in which it is incorporated, and not a resident or inhabitant of any other state, although it may be engaged in business within such other state."

This sweeping statement of a general principle is thus based entirely on the gratituitous assumption in the *Shaw* case that inhabitancy is identical with citizenship and that decisions under the jurisdiction clause are determinative of questions under the venue clause. No such statement of general principle was required for the decision of any of the cases cited. The actual point decided did not go further than the limits expressed in the concluding sentence of the opinion in the *Shaw* case, quoted above, that a corporation incorporated in one state and transacting its business there does not become an inhabitant of another state merely by there transacting a portion of its business through agents appointed by it for that purpose.

The Court may hold on further consideration that those decisions go too far, and that the proper rule is that a corporation is an inhabitant of every state in which it transacts business to a substantial extent, and in which it has a permanent location for purposes of jurisdiction or taxation.[49] But for the purpose of the present case, it is

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[49] A holding that a corporation is an inhabitant of a place where it functions would be recognition of the principles laid down in English decisions cited in *Bank of United States* v. *Deveaux, supra*, 5 Cranch pp. 89-90, and in *Railroad Co.* v. *Letson* (1844) 2 How. 497, 557, that under English rate statutes a corporation was to be considered an inhabitant of any district in which it held lands,

"though they reside elsewhere."

The early decisions in this Court contemplated only the case of corporations organized in a state and doing business in the same state. The modern migratory corporation was then unknown. Thus in *Railroad Co.* v. *Letson, supra*, the Court said (2 How. pp. 558-559):

> "a corporation created by *and doing business in a particular State*, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. • • • it is substantially within the meaning of the law a citizen of the State which created it, *and where its business is done*, for all the purposes of suing and being sued. • • • *When the corporation exercises its powers in the state which chartered it*, that is its residence, • • • "

The importance of the location of a corporation's principal office and activities has likewise been recognized in later cases, such as *Railroad Co.* v. *Koontz*, discussed *supra*, p. 43. (Continued p. 51)

not necessary to go so far. Petitioner's proposition that a corporation having a paper incorporation in one state in which it does no business, having its executive office and

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In *Galveston, &c. Ry. Co.* v. *Gonzales, supra,* holding that a Texas railway company having its principal office in the Eastern District of Texas and running its railway and having an office in the Western District of Texas could not be sued in the latter district by an alien, the Court said (151 U. S. p. 504):

> "In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, *where its books are kept and its corporate business is transacted,* even though it may transact its most important business in another place."

In determining whether suit in the courts of a state other than that in which it is incorporated would constitute a burden on interstate commerce this Court has referred to corporations as residents of "foreign" states in which they have offices and carry on their corporate functions. Thus in *Missouri ex rel. St. Louis, Brownsville & Mexico Ry.* v. *Taylor* (1924) 266 U. S. 200, Mr. Justice BRANDEIS, writing for this Court, said in referring to a corporation organized under the laws of Delaware (p. 207):

> "• • • the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the state."

And in *International Milling Co.* v. *Columbia Transp. Co.* (1934) 292 U. S. 511, this Court, speaking through Mr. Justice CARDOZO, while recognizing the rule of venue declared in the *Shaw* and *Seaboard* cases said (p. 519):

> "• • • the petitioner, though a Delaware corporation is suing in the state of its business activities. For

its actual business situs in another state, is an inhabitant of the latter state within the meaning of the venue provision, is not inconsistent with the theory underlying the decisions of this Court above discussed, that a corporation incorporated in one state and there transacting business is an inhabitant of that state, and is not an inhabitant of another state in which it transacts some business.[50] This distinction does not appear to have been presented or con-

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many purposes, its domicile in law is in the state of its creation (Shaw v. Quincy Mining Co. 145 U. S. 444; Seaboard Rice Milling Co. v. Chicago R. I. & P. Co., 270 U. S. 363), but it is living its life elsewhere. *In a very real and practical sense, it is a resident of the forum,* like the plaintiff in the Taylor case (266 U. S. 200, 207), who was *domiciled in one state and resided in another.*"

A foreign corporation having a permanent business situs in England is there considered a resident for purposes of jurisdiction and service (*Newby* v. *Von Oppen,* 1872, 7 Q. B. 293; *Haggin* v. *Comptoir D'Escompte de Paris,* 1889, 23 Q. B. Div. 519; *Lhoneux* v. *Hong Kong & Shanghai Banking Corp.,* 1886, 33 Ch. Div. 446; *La Bourgoyne,* 1899 App. Cas. 431; *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft,* 1902, 1 K. B. 342; *Logan* v. *Bank of Scotland,* 1904, 2 K. B. 495).

[50] It was so held in *Dodge Mfg. Co.* v. *Patten* (C. C. A. 7, 1932) 60 F. (2d) 676, affirming (D. Ind. 1928) 23 F. (2d) 852, on all fours with the case at bar. There the corporation was incorporated in Delaware and had a nominal office there, but had its factory and executive office in Indiana. The Court held that the corporation was an inhabitant of Indiana within the meaning of the venue provision; that the principles announced by Justice HARLAN in *U. S.* v. *Southern Pacific R. Co., supra,* were applicable; and that the decisions of this Court cited above were not inconsistent with such holding.

sidered in any of the cases in this Court and in the lower courts following the *Shaw* case, cited in respondent's brief in opposition to the petition for a writ of certiorari herein.

Such a holding would better conform to the recognized purpose of the venue provision, to permit a corporation to be sued where it does its business and has its books, rather than to require it to take its books and its evidence to a distant place.[51] It will require a corporation to answer suit in the federal courts in the district where it can most conveniently defend or where, if doing business, it can be most conveniently sued by the plaintiff. The venue statute will thus be made effective as to corporations in the manner explicitly provided by Congress with respect to natural

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[51] The purpose of the venue provision in amended form as embodied in § 51 of the Judicial Act was stated in *General Investment Co.* v. *Lake Shore & M. S. R. Co., supra* (260 U. S. p. 275)

> "to save defendants from inconvenience to which they might be subject if they could be compelled to answer in any district, or wherever found."

And in *Ex parte Moore, supra,* the Court (209 U. S. 490, 502) discussing the nature and purposes of the venue provision, cited as applicable by analogy the following from the opinion on "a kindred question" in *First National Bank* v. *Morgan* (1889) 132 U. S. 141, 145:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process * * *"

persons, and a corporation will not be permitted, as has respondent here, to avoid suit in the district where it does most of its business and to compel those whose property has been affected by the doing of that business to seek it in a distant district chosen by it for paper incorporation.

Conclusion

The importance of jurisdiction in diversity cases over the increasing number of corporations having a nominal incorporation in one state and their real business situs in another presents a situation calling, we submit, for direct consideration by this Court.

The theory expressed by Chief Justice Taney one hundred years ago in *Bank of Augusta* v. *Earle* that a corporation cannot exist outside of the state of its incorporation, rigidly adhered to, would prevent respondent from being sued *in personam* in any court, state or federal, outside of Delaware, by any plaintiff, resident or non-resident, except by its consent. In that view, the designation under the New York statute was a consent to be sued, waiving the venue provision.

If, on the other hand, the Taney theory be recognized today for the fiction which it is, respondent must be recognized as an inhabitant of the Southern District of New York.

In either view, the decision below should be reversed, and respondent should be held suable by petitioners in that district.

Respectfully submitted,

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APPENDIX

NEW YORK GENERAL CORPORATION LAW

§ *210. Authorization of foreign corporations, other than moneyed corporations, to do business within the state.* A foreign corporation, other than a moneyed corporation, shall not do business in this state without having first obtained from the secretary of state a certificate of authority. To obtain such certificate, the corporation shall comply with the following conditions:

1. It shall present to the secretary of state a statement and designation in its corporate name, signed and acknowledged by its president, or a vice-president, or its secretary, treasurer, managing director or attorney in fact, which shall set forth the state or country of its incorporation, the place where its office within this state is to be located, and if such place be in a city, the location thereof by street and number or other particular description; the business which it proposes to do within this state, and a designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state.

2. Annexed to such statement and designation shall be a copy of its certificate of incorporation, duly certified by the public officer having custody of the original, or, if the corporation is created by a special law and has no certificate of incorporation, a duly certified copy of such law, and, if any such copy is in a foreign language, an English translation thereof verified by oath of the translator.

§ *213. Existing authority and designation continued.* Every corporation which, at the time this section takes effect, has authority to do business in the state pursuant to a certificate heretofore granted by the secretary of state,

shall continue to have such authority. The designation heretofore made by any such corporation of a person upon whom all process against it may be served within the state shall continue in full force and effect until the death, resignation or removal from the state of the person so designated or the filing of an amended statement and designation in accordance with section two hundred fourteen revoking such designation, and thereupon the secretary of state shall become the agent of the corporation upon whom all process in any action or proceeding against it may be served within the state.

§ 218 *Contracts of unauthorized corporation not enforceable.* A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority. This prohibition shall also apply to any successor in title of such foreign corporation and to any person claiming under such successor of such foreign corporation or under either of them.

§ 225. *Action against foreign corporation by another foreign corporation or non-resident.* An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

4. Where a foreign corporation is doing business within the state.

Within the meaning of this section, a foreign corporation shall not include a corporation located in this state and created by or under the laws of the United States.[52]

PENNSYLVANIA LAWS OF 1873, NO. 3.

Section 13. No insurance company, not of this state, nor its agents, shall do business in this state until he has filed with the insurance commissioner of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for the said company, shall have the same effect as if served personally on the company within this state, and if such company should cease to maintain such agent in this state so designated, such process may thereafter be served on the insurance commissioner; but so long as any liability of the stipulating company to any resident of this state continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this state, and that such service of process according to this stipulation shall be sufficient per-

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[52] This final paragraph is the only provision not found in Code of Civil Procedure § 1780 in 1917 when respondent's designation was filed.

sonal service on the company. The term process includes any writ of summons, subpoena, or order, whereby any action, suit or proceedings shall be commenced, or which shall be issued in or upon any action, suit or proceedings brought in any court of this commonwealth having jurisdiction of the subject matter.

DELAWARE CORPORATION LAW

Sec. 32. Meeting of Stockholders; Where; Principal Office; Where; Resident Agent:—In all cases after the first meeting of the incorporators, where it is not otherwise provided by the by-laws, the meetings of the stockholders of every corporation shall be held at its principal office in this State. The stockholders and directors may, however, hold their meetings and have an office or offices outside of this State, if the by-laws so provide; and every corporation shall maintain a principal office or place of business in this State and shall have a resident agent, who may be either an individual or a corporation, resident of, or located in, this State, in charge thereof.